IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1908.

THE STATE OF IOWA,

vs.

THE STATE OF ILLINOIS.

Defendant's Brief in Reply.

REPLY OF THE STATE OF ILLINOIS ON MOTION TO SET ASIDE ORDER CONFIRMING COMMISSIONER'S REPORT.

M. M. MOLONEY,
Attorney General of the State of Illinois.

A. W. GREEN,
PERRY B. HOSKINS,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

THE STATE OF IOWA *vs.* THE STATE OF ILLINOIS.	ORIGINAL SUIT IN EQUITY. No. 5.

Reply of the State of Illinois on Motion to set aside Order Confirming Commissioners' Report.

I.

THE ORDER OF APRIL 10, 1893, CONFIRMING THE COMMISSIONERS' REPORT IS NOT A FINAL ORDER.

The order entered herein on the 10th day of April, 1893, confirmed the commissioners' report marking the boundary line between the States of Illinois and Iowa at the Keokuk and Hamilton Bridge, and ordered the commissioners to proceed to determine and mark the boundary line between said states throughout its extent, and report to this Court.

It is contended on behalf of the State of Iowa that this order is a final judgment, and that, therefore, this

Court has no power to change, alter or modify the same after the final adjournment of the Court at the term at which said judgment or decree was entered. Let us see if this position is correct. The object of this suit is to obtain a final decree from this Court locating the boundary line between the States of Illinois and Iowa. An interlocutory decree was entered on January 3, 1893, wherein it was ordered, adjudged and declared by this Court that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River at the places where the nine bridges mentioned in the pleadings cross said river. And it was further ordered that a commission be appointed to ascertain and designate at such places the boundary line between the two states, such commission consisting of three competent persons to be named by the Court upon the suggestion of counsel and be required to make a proper examination and to delineate on maps prepared for that purpose the true line as determined by this Court and report the same to the Court for its further action.

On March 6, 1893, there was filed in this Court a joint request for the appointment of commissioners wherein the names of the commissioners were suggested and a request that the commissioners be directed at once to fix the boundary line on the Keokuk and Hamilton bridge, and an order was entered upon this joint request appointing the commissioners and ordering them to locate and mark the state line between the two states pursuant to the opinion of the Court at each of the nine bridges across the Mississippi River between these states, and in view of the emergency alleged to exist ordering the commissioners to proceed at once to ascertain and mark the

boundary line between the states at the Keokuk and Hamilton bridge, and to report at once their action in that regard before proceeding to ascertain the line or mark the same at the other bridges, and that afterwards they determine and mark the said state line at the other eight bridges when requested by either party, and report the same. The report of the commissioners marking the boundary line at the Keokuk and Hamilton bridge was filed on March 30, 1893, and a motion made by the State of Iowa for an order confirming the same. If a decree had been entered upon that report confirming it and also in terms fixing the boundary line between the two states where the Keokuk and Hamilton bridge crosses the river, there would at least have been some reason in claiming that such an order would have been in the nature of a final order. Such an order even if final, however, could have been set aside by this Court at a subsequent term, if its entry was procured by fraud or imposition.

This Court doubtless saw that if such an order were entered, it would lead to this result:—that as there were nine bridges there might be nine different decrees in this case. The Court therefore while confirming the report did not enter any decree which by its terms fixed the boundary line at this point, but directed the commissioners to proceed to determine and mark the boundary line between the states throughout its extent.

The order is as follows:

"SUPREME COURT OF THE UNITED STATES,

NO. 5, ORIGINAL, OCTOBER TERM, 1892.

The State of Iowa, Complainant,
vs.
The State of Illinois.

This cause coming on to be heard upon the application of the State of Iowa for an order confirming the report of the commissioners, presented herein, ascertaining and marking the boundary line between the State of Illinois and the State of Iowa, at the Keokuk and Hamilton Bridge, at Keokuk, Iowa, it is ordered that the said report be, and the same is hereby, confirmed; and it is further ordered that said commissioners proceed to determine and mark the boundary line between said states throughout its extent, and report thereon to this Court, with all convenient speed, and that the order herein entered on March 7, 1893, be, and it is hereby modified in accordance herewith.

April 10, 1893."

This order has none of the elements of a final decree. It does not purport to adjudge or decree where the boundary line is at the point where the Keokuk and Hamilton bridge crosses the river. It simply confirms the partial report made by the commissioners and directs them to proceed to complete their work.

The previous order required the commissioners to fix the boundary line at this particular point, and make their report, and then to wait before further proceeding until requested by either party. This order of April 10th. requires the commissioners to proceed to mark the boundary line throughout its extent in accordance with the prayer of the bill. It evidently contemplates that when the final report of the commissioners comes before the Court it will be considered, and if confirmed, then a de-

cree will be rendered which shall by its terms fix the boundary line between the states throughout its extent.

It is not the report of the commissioners which finally adjudges where the boundary line shall be. It is the decree of the Court which is to fix the boundary line, and wherein the boundary line must be definitely stated. A decree to be final must by its terms adjudicate the rights of the parties.

The case of *Central Trust Company* v. *Grant Locomotive Works*, 135 U. S., 207, is cited by counsel on this point. The orders held to be final orders in that case are found at pages 210, *et seq*. As said in the opinion of the Court, they were made upon matters distinct from the general subject of the litigation. They determined by their terms the ownership to certain locomotives and the right to their possession and completely adjudicated the rights of the parties to the subject-matter of the petitions upon which they were entered.

In *Fosdick* v. *Schall*, 99 U. S., 235, there was a decree upon an intervening petition. The decree in terms settled the rights of the parties.

In *Trustees* v. *Greenough*, 105 U. S, 527, there was a reference to a master upon a matter incidental to the cause, the inquiry being a collateral one. Evidence was taken before the master, and a report was made by the master. The final order confirmed the report in part and disallowed it in part, and the order itself fixed in terms the amount allowed. The court of course held that this was:

"A final determination of the particular matter arising upon the complainant's petition for allowances, and directs the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision."

In *Williams* v. *Morgan*, 111 U. S., 684, there was a decree fixing the compensation to be paid to the trustees under the mortgage from the fund realized from the sale. This Court says (page 699):

"That the order was such as could be appealed from, we think is equally apparent. It was final in its nature and was made in a matter distinct from the general subject of litigation—a matter by itself, which affected only the parties to the particular controversy, and those whom they represented."

In each of those cases, the order under consideration differs from the order under consideration in this case in two particulars: 1st. Each relates to a matter distinct from the general subject of litigation. 2d. Each of the orders is complete in itself, and by its terms adjudicates the rights of the parties to the order, and is in form a final decree.

The order under consideration in this case relates to the general subject of the litigation, and does not purport finally to adjudicate on that subject. It does not purport to fix the boundary line at any point; it merely confirms a partial report of the commissioners and directs them to proceed to mark the boundary line through its extent. It has none of the elements of a final decree. We are willing to have this order tested by the definition of a final decree cited by counsel from the case of *Beebe* v. *Russell*, 19 How., 285.

"When a decree finally decides and disposes of the whole merits of the cause and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree."

If this order had been entered in a circuit court, it seems to us quite clear that it would not have been ap-

pealable, because it was not a final order. In fact, if the order had simply confirmed the report of the commissioners, and had not gone on and directed the commissioners to proceed further, still it would not have been a final order any more than the confirmation of the report of a master in chancery upon a partnership accounting would be a final order. The Court must go on and by its decree determine the matter in controversy.

In *Kingsbury* v. *Kingsbury*, 20 Mich., 212, upon a bill for a partnership accounting, it was referred to a special commissioner to take an account, who made his report, to which exceptions were taken by the complainant. All of the exceptions were disallowed, and the report of the commissioner was confirmed. Thereupon the complainant appealed to the Supreme Court, and defendant moved to dismiss the appeal on the ground that the order confirming the commissioner's report was not a final decree or order. The court says (page 214):

"But a mere confirmation of the report is not a final decision of the cause. The case must, after such confirmation, be brought on to be heard, and upon the final hearing, if the facts are sufficiently presented to make a decree, the court will then proceed to adjudicate and direct what remedy is to be had against either party and give its decree in such a shape that it can be enforced. The present order contains no such feature. * * * A confirmed report at best stands in the same relation to decree as a verdict to a judgment. It may be almost certain that the decree will follow it, but it cannot be enforced until the decree is entered."

And the court held that the order in question, not being a final decree, was not appealable.

In *Adkisson* v. *Dent*, 88 Ky., 628, it was claimed that an order confirming the report of a commissioner after the term at which it was confirmed, was final. The

court held that it was not final, and might be disregarded by the court when it came to render final judgment, though at a subsequent term. The court says (page 630):

"The court, when there are no reasons shown to the contrary, may, in advance of the final judgment, confirm the report; but this is upon the idea that, as the parties interested have filed no exceptions suggesting inaccuracies, the report is probably correct. But the report possesses no elements of a judgment, and its confirmation does not impart to it the properties of a judgment."

We have been unable to find any case in this Court which upon its facts is like the case at bar, but we refer to the following cases wherein decrees were held not to be final decrees:

Rail Road Co. v. *Swasey*, 23 Wall., 405.
Parsons v. *Robinson*, 122 U. S., 112.
Burlington C. R. & N. Ry. Co. v. *Simmons*, 123 U. S., 52.

We respectfully submit that the order of April 10, 1893, which merely confirmed the partial report of the commissioners, and directed them to proceed to complete their work is not a final order, and that this Court has complete jurisdiction to alter, modify or set it aside as justice shall require.

II.

THE ORDER OF APRIL 10, 1893, WAS NOT ENTERED UPON NOTICE TO THE STATE OF ILLINOIS, NOR DID THE STATE OF ILLINOIS EVER CONSENT TO THE ENTRY THEREOF.

It is claimed that the order of April 10, 1893 was entered upon notice to and agreement by the State of Illinois. This claim is based upon the affidavit of Walter I.

Hayes filed on behalf of the State of Iowa. In that affidavit, Hayes says that he received a telegram from M. T. Maloney, Attorney General of the State of Illinois, which is as follows:

WESTERN UNION TELEGRAPH COMPANY.

* * * * *

Number 47 nv. Sent by tz. Recd. by Bn. 35 pd.
Received at Corcoran Bldg., S. E. cor. 15th & F. Sts., Washington, D. C., Mar. 26, 1893, dated Springfield, Ill., 26.

To Walter I. Hays, Cr. J. H. Cole, Washn.

You are authorized to appear in Sup. court of U. S., in case of Iowa v. Illinois, and consent to the confirmation of the report of commissioner as to line at Keokuk and Hamilton Bridge.

M. T. MALONEY.

In the petition filed by the State of Illinois, which is signed by Attorney General Moloney of that State, it is alleged "that no notice was ever given to its Attorney General or in any way to the State of Illinois that the said commissioners had made their said report or that an application would be made to this court to confirm any report of said commissioners; that not until after the final adjournment of this court at its last term did the Attorney General of the State learn that a report had been made by the said commissioners, and that said report had been confirmed."

In view of this allegation it need hardly be said that the telegram attached to the affidavit of Hayes was a surprise to the counsel for the State of Illinois. An examination of the affidavit in connection with the record in this cause changed that surprise to suspicion.

The telegram is dated March 26, 1893, which was Sunday, and is sent to Hayes, care of J. H. Cole, Washington.

It is not explained how the Attorney General of Illinois came to send such a telegram. It is not claimed that it was sent in response to any communication from counsel for the State of Iowa, or from anybody else. It is not claimed that any notice was served upon the State of Illinois or its Attorney General, that the commissioners had made their report and that an application would be made to confirm such report, or that on the 26th of March, 1893, the Attorney General of Illinois knew anything about it. On these points the affidavits filed on behalf of the State of Iowa are absolutely silent. Yet the claim is made that on Sunday, March 26, 1893, the Attorney General of Illinois of his own motion telegraphed to Mr. Hayes to appear in this Court in this cause, and consent to the confirmation of the report of commissioners as to line at Keokuk and Hamilton bridge. What did Mr. Hayes do? From his affidavit, one would suppose that the record in this cause would show that he appeared on behalf of the State of Illinois and consented to the confirmation of this report, but he did not do so. On March 30, 1893, the record shows that on motion of Mr. Walter I. Hayes in behalf of counsel, leave is granted to file the report and a motion to confirm was submitted by Mr. Hayes on behalf of counsel. In behalf of what counsel? We should expect the motion to be on behalf of counsel of both states or on behalf of the State of Iowa and consented to by the State of Illinois, but Mr. Hayes was apparently suspicious of this telegram himself.

The motion he did submit was as follows:

"Now comes the said plaintiff, the State of Iowa, and moves the Court for an order confirming the report of the commissioners appointed by this Court to determine and mark the boundary line between said States at the nine bridges across the Mississippi river between said States

so far as it relates to the boundary at the Keokuk and Hamilton bridge, at Keokuk, Iowa, upon which report has been made. Said motion is founded upon said report and the record in this case.

(Signed) J. H. COLE.
WALTER I. HAYES,
Attorneys for Plaintiff.

Cole is not an attorney, but superintendent of the Bridge Company. It is admitted by Mr. Hayes that Cole is not an attorney, but he says that he conceived the idea that Cole was an attorney, although his name does not appear upon any of the briefs or other papers connected with this suit. Yet it is plain from the telegram that Cole himself was in Washington with Hayes, because the telegram is sent to Hayes, care of J. H. Cole. We shall see later on why it was so sent. No explanation however is given by Mr. Hayes why, if he considered this telegram genuine, he did not appear on the record as the attorney for the State of Illinois, and consent on behalf of that State to the confirmation of the report. The record however shows that the motion was made on behalf of the State of Iowa, and that Hayes appeared on that motion as the attorney for that State. Mr. Hayes, suspicious of the telegram, apparently did not care to have it placed of record that he appeared as the attorney for the State of Illinois and consented to the confirmation of the report.

Mr. Hayes may have stated verbally to the Court that the State of Illinois consented. If he did, it explains why this Court entered the order of April 10th without requiring notice to the State of Illinois. If this be the fact, it was an imposition upon this Court, because this alleged telegram was not sent by Attorney General Moloney, nor by his authority, nor did he know anything about it until he saw the copy of the telegram printed among the papers

of the State of Iowa. The matter was at once examined. The result of this examination appears in the affidavit of the Attorney General filed herewith, and a printed copy of which is attached to this brief.

Mr. George Edmonds is attorney for the Keokuk and Hamilton Bridge Company, and has been such attorney since 1871, as he himself states in his own affidavit filed on this motion.

Mr. Moloney became Attorney General of the State of Illinois on January 11, 1893. He appointed as his own assistant Mr. T. J. Scofield. Mr. Scofield is the son-in-law of Mr. George Edmunds. From March 20th to March 27, 1893, inclusive, Mr. Scofield was sick and confined to his home. Mr. Moloney's home was at Ottawa, Illinois. The Supreme Court also meets at Ottawa, Illinois, and it is the duty of Mr. Moloney as Attorney General to attend the Supreme Court when in session, to take care of the cases in which the People of the State of Illinois are interested. He swears that he was in Ottawa from March 20th to March 22d. and that he returned to Springfield on March 22d, left that city on March 24th and returned to Ottawa, where he remained until April 3d, when he again returned to Springfield. The correspondence at the Attorney General's office was large, and needed constant attention. It was necessary for the Attorney General to be in Ottawa. Mr. Scofield was sick, and he suggested that his father-in-law, Mr. George Edmonds, would come to the Attorney General's office and attend to the ordinary correspondence thereof. From March 22d to March 27th Mr. George Edmonds remained in the attorney general's office attending to the correspondence addressed to said office, and his duties were confined thereto. At that time the Attorney General did not

know that Mr. Edmonds was the attorney for the Bridge Company, nor did he learn that fact until after the adjournment of this Court at its last term. Attorney General Moloney swears that he does not know and never did know Walter I. Hayes or John H. Cole; that he never sent the telegram in question and did not know of its existence until he saw what purports to be a copy of it a few days ago among the affidavits filed in this cause on behalf of the State of Iowa; that upon seeing the telegram he made diligent inquiry in regard to it, and ascertained that it was written and sent by George Edmonds, on Sunday, the 26th day of March, 1893; that George Edmonds had no authority, directly or indirectly, to send said telegram, and that had he, Attorney General Moloney, known of it, he would have repudiated it; that he would not agree to appoint anybody to act on behalf of the State of Illinois in this matter without having an opportunity of personally inspecting and examining said report. He further states positively that no notice was ever given to him, nor was he informed by anybody that the commissioners had made their report, or that an application would be made to this Court to confirm any report of said commissioners; nor did he learn until after the final adjournment of this Court at its last term that the report of said commissioners had been confirmed, or that any report had ever been made by said commissioners.

It therefore appears that Mr. George Edmonds, the attorney for the Bridge Company, without any authority from the Attorney-General of the State of Illinois, sent this telegram, signing Attorney General Moloney's name thereto. He knew, of course, that Cole, the superintendent of the Bridge Company, was in Washington.

The Bridge Company stands behind the State of Iowa in this suit. Cole, in his affidavit, states that there has been litigation between this Bridge Company and various municipalities in Illinois over the question of taxation, in a number of which Mr. A. W. Green has appeared as counsel for the City of Hamilton and the Township of Montebello; all of which culminated by agreement between both parties, and at the suggestion of the attorneys of Illinois, in invoking the aid of the States of Iowa and Illinois to determine the question of the boundary line.

This statement is not true, nor is it in accordance with the statement contained in the affidavit of Mr. George Edmonds, the attorney for the Bridge Company. He states that he applied on behalf of the Bridge Company to Attorney General Hunt to bring suit in this Court against the State of Iowa in the name of the State of Illinois, and that Mr. Hunt refused, but said that if the State of Iowa would bring suit he would appear and answer for the State of Illinois, and that thereupon application was made to the Attorney General of Iowa and suit was brought.

It is quite clear that Mr. Edmonds has been the manager of this suit on behalf of the Bridge Company, the State of Iowa being the nominal plaintiff. He procured the signature of the Attorney General of Illinois to the joint request for the appointment of commissioners, not disclosing to the Attorney General that he was the attorney of the Bridge Company, but presumably acting in the public interest or from friendship to the Attorney General who had appointed his son-in-law as his assistant. Mr. Cole, in his affidavit, admits that the expenses of the commissioners were paid by the Bridge Company, the

reason he gives, being that there was no fund available for that purpose in either State, nor would there be until after the meeting of their respective legislatures. As a matter of fact, the legislature of Illinois was then in session. This, however, is not particularly material. It is, however, material that the telegram relied upon in this case was sent by Mr. George Edmonds, the attorney of the Bridge Company; that it was sent without any authority from the Attorney General of Illinois, and without his knowledge. It was a part of the scheme on the part of Cole and Edmonds after this Court had decided the legal question involved in favor of the State of Illinois, by underhanded means, to wrest from the State of Illinois the fruits of that victory.

Counsel in their brief say that it appears by the affidavit of Mr. George Edmonds that he was in Springfield on the 1st. or 3d. of April, 1893, and then indicated to the Attorney General of the State of Illinois the fact that the report had been filed.

Mr. Edmonds' affidavit on this point is to the effect that "on Saturday 1st or Monday 3d of April, 1893, deponent was at the Attorney General's office of Illinois, at Springfield, and there informed either the Attorney General or his assistant that said report had been filed and motion for confirmation made, and as the time to make a new assessment was near at hand, requested that the matter be attended to at once."

Attorney General Moloney swears that he was not in Springfield on the 1st of April, but that he returned there on the 3d of April, and that he did not see Mr. Edmonds on that day. But why was it necessary to inform the Attorney General of Illinois on the 1st. or 3d. of April that the report had been filed, and request him

to attend to it, if, as is claimed, he had sent a telegram on March 26th authorizing Hayes to appear for the State of Illinois, and consent to the confirmation of the report?

Edmunds without authority on March 26th sends this telegram to Hayes, care of Cole, and says that he walked into the Attorney General's office at Springfield on the 1st or 3d of April, and told him that the report had been filed and requested him to attend to the matter. Further comment on these facts would seem to be unnecessary. The State of Illinois never agreed to the confirmation of this report. It never had any notice that the report would be presented for confirmation, and the statements in regard thereto in the petition filed on behalf of the State of Illinois are strictly true.

III.

MERITS OF THE CONTROVERSY.

Counsel for the State of Iowa claim "that the main channel of the Mississippi river at the point where crossed by the Keokuk and Hamilton Bridge is substantially from the west bank of Island No. 4 to the Iowa shore, and was navigable from bank to bank." Even if the river was navigable from bank to bank at this particular point for boats crossing the river, it would not follow that the channel of commerce used by steamboats and other vessels engaged in the carrying trade up and down the river extended from bank to bank. There might be a pathway across the river which ferry and other boats could use; but that has no bearing on the question to be determined in this case. Yet a great part of the affidavits filed on behalf of the State of Iowa are taken up with statements in regard to this cross-channel.

We are to ascertain in this case the main navigable channel usually followed by vessels engaged in the carrying trade, and the middle of that channel is the boundary line. It is not expected that the exact location of this channel shall be fixed upon this motion. The question on this motion is whether the commissioners have correctly fixed the boundary line. If they have not, then the order, so far as it confirms the report of the commissioners, should be set aside. Counsel for the State of Iowa say that the "boundary line was located entirely with reference to the navigability of the stream. The measurement in Illinois was made from 200 to 250 feet west of the shore line, and the measurement from the Iowa shore was made some fifty feet east of the shore line, and these two points west of the shore of Island No. 4 and east of the Iowa shore were located with reference to the navigability of the river at and between said points."

If this be true, then the line was not fixed by the commissioners at the proper point on their own showing, as will appear from an examination of the plat filed by the commissioners with their report. This plat shows that the commissioners fixed the shore lines and established the boundary line exactly midway between these two shore lines, being 1,461.35 feet from the Iowa shore, and 1,461.35 feet from the Illinois shore.

Turning now to the joint affidavit of Carpenter and Meigs, they state that they "took a point 500 feet east of the easterly Illinois abutment of said bridge, said abutment having been constructed about 700 feet into the river west of the original shore to island number 4, and then measured westerly to a point about 200 feet west of the abutment of the Iowa shore, said abut-

ment being about 250 feet east of the Iowa shore." That would make the western boundary of the channel, according to the commissioners, fifty feet east of the Iowa shore, and the middle of the channel would be midway between that point and the Illinois shore. The plat shows that the boundary line is fixed exactly midway between the two shores. Therefore, if the statement in the affidavit is correct, the boundary line is twenty-five feet out of the way. Again, on the plat of the commissioners there is marked the "approximate low water line of "river." It would hardly seem as if the distance between the low water line and the shore line as established by the commissioners could be a part of the main navigable channel of the Mitsissippi river, but according to their affidavit it is included in that channel.

In this joint affidavit it is stated that "within the bed of the main stream there is an artificial channel in the narrower sense lying along the Iowa shore, which is *purely artificial*, and was excavated in the solid rock." It is claimed on behalf of the State of Iowa that in ascertaining the channel it must be ascertained as it was before the bridge was built, and as the channel existed in its natural state, and yet these commissioners include as a part of the channel this purely artificial channel mentioned in the affidavit. This plat filed by the commissioners with their report shows the steamboat channel. The west portion of that steamboat channel, we understand, is the artificial channel spoken of in the affidavits. It is not a part of the navigable channel referred to in the affidavits filed on behalf of the State of Illinois. The eastern portion of the steamboat channel is marked on the plat of the commissioners, being that portion east of the pivot pier, and is a portion of the original main navigable channel.

An examination of this plat filed by the commissioners with their report, we submit, must convince any one that the boundary line was fixed by first establishing the shore lines and then taking a point midway between the two shore lines as the boundary line.

As we have stated, it is claimed on behalf of the State of Iowa, that the boundary line is not to be determined by the condition of the bed of the river at the present time, but that it must be determined by the location of the main navigable channel prior to the construction of the Keokuk and Hamilton Bridge and before any changes were made by artificial means. Let us concede that proposition. Do the affidavits filed on behalf of the State of Iowa sustain the proposition that the boundary line as fixed by the commissioners is the middle of the the main navigable channel determined in this manner? We have already shown that the joint affidavit of the two commissioners proves that even on their own showing the line is not corectly fixed.

Taking the affidavits filed by the State of Iowa as a whole, there is very little said in any of them in regard to the real question in issue here. A great part of them is taken up in attempting to show that there was a passage way for ferry and other boats from the Iowa shore to the shore of Island number four. Even this passage way was at some distance below the bridge. For instance, C. C. Carpenter swears that "lumber that is designed for points in Illinois oppo- "site Keokuk, Iowa, is brought down through the canal "and down through the pivot span of the Keokuk and "Hamilton Bridge to where there is good water and "taken across the river below said bridge and landed on "the Illinois shore." (Complainant's Rec., 40.) Henry

B. Whitney swears that he has crossed and recrossed the river repeatedly at a point about 400 feet east of the Iowa shore, and about 150 yards below the above named bridge. (Complainant's Rec., 38.) There are other affidavits to the same effect. Other portions of the affidavits speak of a certain warehouse on the west shore of Island number 4. Just where this warehouse was located the affidavits leave in doubt. One of the plats shows it at the end of a dyke built out in the river. But all such matters in the affidavit seem to us to be immaterial.

It may be conceded that, at certain seasons of the year, steamboats made landings at certain places on Islands numbers 2 and 4. It may also be conceded that the river near the Illinois shore at Hamilton was as good for navigation as it was near the Iowa shore at Keokuk before the bridge was built. We have never claimed that the main navigable channel extended to the Iowa shore. It might just as well be said that at low water the river is navigable from bank to bank. The difference between high and low water is sometimes, we are informed, as great as twenty-two feet, and in extreme high water Island number 4 itself is navigable. The real question to be decided in this case is,—where is the main navigable channel of the river usually followed by vessels engaged in the carrying trade up and down the river? Upon this question the affidavits filed on behalf of the State of Iowa are strangely silent. Meigs and Carpenter, two of the commissioners, it is true, state that the whole width of the main arm of the Mississippi River between the points specified in their affidavit was the channel of navigation of the Mississippi River, but other portions of their affidavit qualify considerably this statement, and their affidavit also shows, as we have said, that they

have not even, by their own showing, correctly fixed the boundary line on the plat filed with their report. They do not, however, pretend to swear that prior to the construction of the Keokuk and Hamilton Bridge the main navigable channel of the river usually followed by vessels engaged in the carrying trade extended from shore to shore. In fact, they do not show that, of their own knowledge, they were qualified to give any testimony upon that point. They say that they examined authenticated maps and soundings made by the engineering corps of the United States Army during the last fifty years, but it is a significant fact that no copy of any of these maps is filed with these papers.

Among the affidavits filed on behalf of the State of Iowa on this motion is an affidavit by Albert Wempner, the other commissioner, in which he seeks to explain an affidavit made by him in the case of the *Keokuk and Hamilton Bridge Company* v. *Bertschi*, in which the same question was involved as in this case. The affidavit made by Wempner in that case is as follows:

IN THE CIRCUIT COURT OF HANCOCK COUNTY, ILLINOIS.

Keokuk and Hamilton Bridge Company, *Complainants*, vs. John W. Bertschi, County Treasurer and ex-officio Collector of Hancock County, Illinois, and William M. Guthrie, Assessor of the Town of Montebello, *Defendants*.	*Affidavit*.

STATE OF IOWA, } ss.
LEE COUNTY. }

Albert Wempner, being first duly sworn, doth depose and say that he is a resident of Keokuk, Iowa, and has been engaged as master and pilot of steamboats on the

Mississippi River, most of the time since the year 1852; that he is entirely familiar with the Mississippi River at and near the city of Keokuk, Iowa, and was for many years prior to the building of the Keokuk and Hamilton bridge at that point; that before the building of said bridge the only channel in said river at or near the place crossed by said bridge along which vessels in the carrying trade did or could pass, was near the Iowa shore, the west line of said channel being where the pivot pier of said bridge now stands, and the east line of said channel at a point between three hundred and four hundred feet east of where said pier now stands; that the above described channel was the only channel at this point that could be or was used for the purpose of commerce on said river, the water east of said channel being too shallow in an ordinary stage of water to be used by vessels engaged in the carrying trade; that the only change in said channel at said point, since said bridge was built, was made by artificial means, by blasting and removing the rock-bed of the river and extending said channel westward to the west abutment of said bridge.

In witness whereof I have hereunto set my hand this 25th day of April, A. D. 1891.

ALBERT WEMPNER.

Subscribed and sworn to before me this 25th day of April, A. D. 1891.

ALANSON L. PARSONS,

(L. S.) Notary Public in and for Lee County, Iowa

(Deft's. Rec., p. 27.)

In his affidavit, filed upon this motion, he makes the following statement in regard to his former affidavit:

That I have not had submitted to me the original of said affidavit, and as to the correctness of the copy I am unable at this time to state. I state, however, that the said affidavit, said to have been made by me on or about the 25th day of April, 1891, was made, to some extent, upon a misapprehension of the facts; that while acting as pilot upon the Mississippi River, boats engaged in the carrying trade, going north of the city of Keokuk, as a matter of convenience, ordinarily selected a channel running nearer the Iowa shore than to the Illinois shore; that

where my affidavit states "that said boats could not go easterly at a point in the vicinity of the Iowa shore in said channel," I was mistaken, and that portion of the affidavit was not called to my attention at the time of making same, as I have personally known for a great many years that the Mississippi River at a point between Keokuk, Iowa, and Hamilton, Illinois, at the place where the Keokuk and Hamilton bridge is located, was prior to the location of the bridge navigable for steamboats engaged in the commerce of said river. (Compl't's. Rec., p. 18.)

It will be observed that the only statement in his first affidavit in which he claims he was mistaken is, "that "said boats could not go easterly at a point in the vicinity "of the Iowa shore in said channel." We find no such statement in his first affidavit. As a matter of fact, his present affidavit does not contradict his former affidavit as far as it relates to facts within his own knowledge. He does say, of his own knowledge, that the Mississippi River at the place where the Keokuk and Hamilton bridge is located was prior to the location of the bridge navigable for steamboats engaged in the commerce of the river; but he does not state where the navigable channel was located. He also states that after he was appointed commissioner he made careful examinations of the bed of the river, and examined surveys and plats of the same, with a view of ascertaining the middle of the main navigable channel, and became satisfied that the middle of said channel was at the point named in his affidavit, which, by the way, is not the point marked on the plat filed with the commissioners' report.

But it was unnecessary, according to his former affidavit, for him to make any examinations of plats or surveys, because according to that affidavit he had personal knowledge from the year 1852 in regard to the location

of the navigable channel used for the purposes of commerce on the river, and he locates it at the same place as it is located in the affidavits filed on behalf of the State of Illinois on this motion, "the west line of said channel being where the pivot-pier of said bridge now stands, and the east line of said channel at a point between three and four hundred feet east of where said pier now stands." It is also a significant fact that in this former affidavit he calls attention to the change in the channel since the bridge was built, made by blasting and removing the rock-bed of the river and extending the channel westerly to the west abutment of said bridge. These two affidavits of Wempner illustrate quite clearly the difference between the affidavits filed upon this motion by the State of Illinois and the State of Iowa. Wempner's first affidavit is directly to the point in issue. The last affidavit of Wempner entirely evades that point. We may add that Wempner in his last affidavit does not deny the statement in Waggoner's affidavit, that Wempner told him that in fixing the boundary he, Wempner, did not consider that the channel used by boats had anything to do with the matter. (Deft's Rec., page 37.)

George Edmonds also makes an affidavit in regard to the condition of the river, for Mr. Edmonds is not only the attorney of the Bridge Company, but he has been a civil engineer and a stone contractor, and has also occupied other positions as disclosed by this record. He says that in his opinion, before the construction of the dam and dyke referred to in his affidavit any steam or other boat that could pass over the rapids at any stage, high, low, or medium water, could as easily and safely pass over any part of said river between said island and said Iowa shore as it could pass over said rapids. But the ques-

tion here is not what steamboats could do but what they did do. What course did they usually follow in going up and down the river?

Hamilton's affidavit on this point is to the same effect, and merely gives his opinion. Whitney's affidavit refers more particularly to the cross channel in the river. The same may be said of the affidavits of Sample and Conn.

Jones's affidavit proves too much. He says: "I find by careful measurements that at a point 250 feet from the Iowa shore line there is at this date with a stage of 1.4 feet above low water no water at all at that point, and that it would be necessary to go at least fifty feet further to reach the west abutment of said bridge." (Complt's. Rec., 43.) The west abutment of said bridge, therefore, would be 300 feet from the Iowa shore. Fifty feet west of the abutment there is no water, and yet the commissioners in their affidavit say that the westerly line of the navigable channel is 200 feet westerly from the west abutment of said bridge, so that in 150 feet of this channel, which, it is claimed, is the main navigable channel of the Mississippi River used by vessels at all seasons of the year, there is no water at all.

These are samples of the affidavits filed on behalf of the State of Iowa on this motion. In great part they do not touch the issue at all. Where they do touch the issue, they are shown to be incorrect.

The affidavits filed on behalf of the State of Illinois are directly in point and made by persons who had personal knowledge of the location of the navigable channel for many years prior to the building of the bridge. They are to the effect that before the Keokuk and Hamilton bridge was built the navigable channel originally used and along which vessels in the carrying trade passed,

was near the Iowa shore; the west line of said channel was where the pivot pier of said bridge now stands, and the east line at a point not exceeding 400 feet east of where said pivot pier now stands; the above described channel was the only channel in said place where vessels engaged in the carrying trade could pass. (Deft.'s Rec., pp. 34, 35, 36, 29, 33.)

Counsel say that the boundary line of a state could hardly be determined upon the statements contained in these affidavits. That is entirely true. It is not asked or expected that the Court, on this motion, will proceed to fix the boundary line, but these affidavits do show conclusively that the middle of the main navigable channel is not at the point fixed by the commissioners as the state boundary line. We do not expect this Court to fix the line on *ex parte* affidavits on either side, but it is quite clear from all the affidavits that the line was not correctly fixed by the commissioners.

There is another aspect of this case which seems to have escaped the attention of the counsel for the State of Iowa. If their contention on this motion is correct, then this suit is an imposition upon this Court. If the main navigable channel in fact extends from shore to shore, then there was no question of law to be decided between the State of Illinois and the State of Iowa. But such is not the case made by the pleadings. The original bill of the State of Iowa claims that the boundary line is the middle of the Mississippi River; "yet said State of Illinois and its several municipalities bordering on said Mississippi River, claim the right to and do assess and tax as in Illinois, all bridges and other structures in said river from the Illinois shore to the middle of the steamboat channel or channel of said river usually tra-

versed by steam and other crafts in carrying the commerce of said river regardless of whether said channel is east or west of the middle of the main body or arm of said river." The bill also alleges, "That the steamboat channel or channel of the river where boats ordinarily run in carrying the commerce of the river varies from side to side of said river, sometimes next to the Illinois shore and then next to the Iowa shore, and at other times crosswise at most points in said river shifting from place to place as the sands of its bed are changed by the current at every stage or change of water; that at the point of the Keokuk and Hamilton bridge the river bed is rock and not subject to much change; that at that point, were it not for the bridge, the middle of the steamboat channel would be and was before said bridge was erected, fully 300 feet east of the east end of the draw in said bridge, or 880 feet from the Iowa shore of said river, and 2,162 feet from the shore of said river in Illinois on Island No. 4."

In the cross-bill of the State of Illinois it is alleged that the State of Iowa assesses and taxes the bridges to the middle of the main body of said river, while the State of Illinois assesses to the middle of the channel usually traversed by steamboats in navigating said river, and "that the middle of the steamboat channel, or that part of the river usually traversed by steamboat men in navigating said river, is at or near the east end of said draw or pivot span about 380 feet from the west abutment, and 1,812 feet from the east abutment."

The answer of the State of Iowa to this cross-bill admits "that said State of Illinois and its several municipalities bordering on said river, claim the right to tax said bridges from the Illinois shore of said river to the

middle of the channel of commerce, or steamboat channel—that is, the channel usually used by steamboats and other crafts in navigating said river—and that this respondent, the State of Iowa, and its several municipalities bordering on said river, claim the right to, and do tax said several bridges to the middle of the main arm or body of said river, regardless of where the channel of commerce or steamboat channel—that is, that part of said river usually traversed by steam or other vessels carrying the commerce of said river—may be."

It was conceded by these pleadings that the navigable channel usually followed, was near the Iowa shore; they differ as to the exact location of this channel, but they all agree that it is west of the middle of the main body of the river. The contention between the two states, both in this Court and in all prior litigation, was whether the boundary line was the middle of this channel of navigation or the middle line between the two shores. This Court in its opinion thus states the contention:

"The Mississippi River flows between the States of Iowa and Illinois. It is a navigable stream, and constitutes the boundary between the two states; and the controversy between them is as to the position of the line between its banks or shores which separates the jurisdiction of the two states for the purposes of taxation and other purposes of government.

The complainant, the State of Iowa, contends that, for taxation, and for all other purposes, the boundary line is the middle of the main body of the river, taking the middle line between its banks or shores without regard to the 'steamboat channel,' as it is termed, or deepest part of the stream, and that, to determine the banks or shores, the measurements must be taken when the water is in its natural or ordinary stage, neither swollen by floods nor shrunk by droughts.

On the other hand, the defendant, the State of Illinois, claims that, for taxation and all other purposes, its jurisdiction extends to the middle of 'the steamboat channel' of the river, wherever that may be, whether on its east or west bank—the channel upon which commerce on the river by steamboats or other vessels is usually conducted, and which for that reason is sometimes designated as 'the channel of commerce.'"

The State of Iowa cited on behalf of its contention the case of *The Dunlieth and Dubuque Bridge Company* v. *the County of Dubuque*, 55 Iowa, 558, wherein the Supreme court of Iowa decided that the boundary line was the middle of the river measuring from bank to bank. The State of Illinois cited on behalf of its contention the case of *Buttenuth* v. *St. Louis Bridge Company*, 123 Ill., 535, wherein the Supreme court of Illinois decided that the boundary line was the middle of the channel of commerce. This Court, it is conceded, decided in accordance with the contention of the State of Illinois.

Now, the State of Iowa turns round and in face of the contention of itself and its municipalities through all these years attempts to change front and says that the channel of commerce extends from shore to shore. If this were so, then this suit, as we have said, was an imposition upon this court; but it is not so. It is clear from the pleadings in this case, it is clear from the affidavits filed upon this motion that the main navigable channel of the river—the channel of commerce used by vessels engaged in the carrying trade, is not the same as the river from bank to bank; that this channel of commerce is, and was before the bridge was built, near the Iowa shore.

It seems to us equally clear that the commissioners located the boundary line by fixing the shore lines, and

taking a point midway between those two lines, fixed upon that point, because it was midway between the two shores, thus fixing the boundary line at the exact point which the State of Iowa claimed in its pleadings was the boundary line.

We respectfully submit, therefore, that this partial report of the commissioners is erroneous, that the order confirming this report should be set aside, that the report itself should also be set aside and an order entered in accordance with the prayer of the petition of the State of Illinois.

Respectfully submitted.

M. T. Moloney,
Attorney General of the State of Illinois.

A. W. Green,
Henry S. Robbins,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1893.

The State of Iowa
vs.
The State of Illinois. } *Original Suit in Equity.*

STATE OF ILLINOIS,
COUNTY OF COOK. } ss.

Maurice T. Moloney, being duly sworn, doth depose and say as follows:

I am Attorney General of the State of Illinois, and have been such since the eleventh day of January, A. D. 1893. By the law of this State I was entitled to only one assistant when I assumed control of said office, and that condition of affairs continued until the first day of July last past. On assuming control of said office I appointed Mr. T. J. Scofield as my assistant. The said T. J. Scofield is the son-of-law of Mr. George Edmonds, who has made an affidavit in this cause on behalf of the State of Iowa. During the latter part of the month of March and including from the 20th to the 27th of said month my said assistant, Mr. Scofield, was sick and confined to his bed in his home in the city of Springfield. During said time the Supreme Court of the State of Illinois was in session in Ottawa, La Salle County, in said State. The said city of Ottawa is and has been my home since assuming the said office, and I have not yet removed my family from the city of Ottawa to the said city of Springfield, and it is and

has been my custom to return to Ottawa to my family on Saturday of each week.

I further state that it is made by law my duty to attend the Supreme Court of the State of Illinois at each session thereof and write briefs in People's cases on behalf of the People.

I further state that I have made it a rule to keep an exact account of the number of days that I have been absent from the city of Springfield since the 11th day of January last past. On the 20th day of March, at 11:40 A. M., I left the city of Springfield and went to Ottawa, and returned from said last named city on the night of the 22d of March, and remained in the city of Springfield until the night of March 24th, when I again left said city of Springfield and returned to the city of Ottawa, where I remained until the 3d day of April following, when I returned to the city of Springfield on said last named date. From the 24th to the 3d day of April aforesaid I was in attendance on the Supreme Court of the State of Illinois, then in session in Ottawa, and during said time was engaged in comparing abstracts and records, and writing briefs on behalf of the People in People's causes then pending at the March term of said court.

I further state that the legislature of the State of Illinois was, during the month of March, in session in Springfield, and numerous questions from that source were being propounded to me which required immediate answers. The volume of business coming to said office was quite large, and, in my opinion, required immediate attention. Inasmuch, therefore, as my assistant was confined to his home by sickness, and as I was compelled to be in Ottawa attending the Supreme Court, my said assistant, Mr. Scofield, suggested that his father-in-law,

Mr. George Edmonds, would come to my office and attend to the ordinary correspondence thereof during my absence therefrom. From the 22d of March until the 27th of said month, inclusive, the said George Edmonds remained in my office, attending to the correspondence addressed to said office, and his duties were confined thereto. The first knowledge that I had of said cause was when Mr. George Edmonds requested me to sign the joint request to appoint commissioners. I did not know at that time that Mr. Edmonds was attorney for the Keokuk and Hamilton Bridge Company, and did not learn such fact until after the adjournment of this court at its last term.

It is stated in the affidavits in this cause on this motion filed on behalf of the State of Iowa that I sent a telegram on the 26th day of March to one Walter I. Hayes, which said telegram is as follows, to wit:

To Walter I. Hays, Cr. J. H. Cole, Washn.

You are authorized to appear in Sup. Court of U S. in case of *Iowa* v. *Illinois*, and consent to the confirmation of the report of Commissioner as to line at Keokuk and Hamilton Bridge.

M. T. MALONEY.

I do not know, and never did know, the said Walter I. Hays, or the Mr. Cole in whose care said telegram purports to have been sent. I am now informed that the said Mr. Cole is the superintendent of the Keokuk and Hamilton Bridge Company referred to in the brief filed herein on behalf of the State of Illinois. I never sent said telegram, and did not know of its existence until I saw what purports to be a copy of it a few days ago among the affidavits filed in this cause on behalf of the State of Iowa. Upon seeing said telegram so printed as aforesaid, I made diligent inquiry in relation to the same,

and ascertained that it was written and sent by the said George Edmonds on Sunday, the 26th day of March, 1893, to the said Walter I. Hays, in care of said Mr. Cole. The said George Edmonds had no authority directly or indirectly from me to send said telegram, and had I known of it I would have repudiated the same. I would not agree to appoint anybody to act for or on behalf of the State of Illinois in this matter without first having an opportunity of personally inspecting and examining said report. Said telegram was sent as aforesaid without my authority or knowledge, and I only learned of it as hereinbefore stated. I did not see Mr. Edmonds in my office on the third day of April, 1893, nor at any other place on that day.

I further state positively that no notice was ever given to me nor was I informed by anybody that the said commissioners had made their report or that an application would be made to this court to confirm any report of said commissioners, nor did I learn until after the final adjournment of this court at its last term that the report of said commissioners had been confirmed or that any report had ever been made by said commissioners.

Subscribed and sworn to
before me, this 14th day of
November, A. D. 1893.

MAURICE T. MOLONEY.

FRANK M. PETERS,
Notary Public.
[NOTARIAL SEAL.]